

IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MULTNOMAH

**PROVIDENCE HEALTH &  
SERVICES-OREGON**, an Oregon nonprofit  
corporation, dba Providence Portland Medical  
Center,

Case No.: 16CV38474

**REPLY IN SUPPORT OF MOTION TO  
DISMISS**

Plaintiff,

vs.

**SANJANA PAHALAD MANCUSO**,  
personal representative of the Estate of Rattan  
Kumar Pahalad, in her official and personal  
capacities,

Defendant.

Sanjana Pahalad Mancuso, personal representative of the Estate of Rattan Kumar  
Pahalad, moved to dismiss a cause of action asserted against her<sup>1</sup> to impose personal liability for  
disallowing a claim against the estate filed by Plaintiff, Providence Health & Sciences-Oregon  
(PH&S-O). PH&S-O opposes the motion to dismiss arguing that disallowance of the claim  
constituted a breach of fiduciary duty even though Mancuso followed the procedural  
requirements of the probate code and PH&S-O's claim will be allowed if it is able to prove the

<sup>1</sup> PH&S-O asserts this cause of action is an "alternative or supplemental" claim; however,  
the wrongful denial of probate claim cause of action is not an alternative claim. It is a separate  
cause of action seeking personal liability against the personal representative of the estate for  
disallowing a claim it filed.

1 validity of the claim. PH&S-O contends the damages it may suffer include attorney's fees and  
2 interest it will incur in proving the validity of the claim.

3 PH&S-O has not alleged any facts supporting a breach of fiduciary duty. If the Court  
4 adopts PH&S-O's position and permits PH&S-O to pursue a cause of action for breach of  
5 fiduciary duty, it will mean that a claim for breach of fiduciary duty may be stated against a  
6 personal representative any time a personal representative disallows any claim submitted to the  
7 estate. No Court has ever held the disallowance of a probate claim constituted a breach of  
8 fiduciary duty, and this Court should not be the first. To do so would eviscerate the probate  
9 code's procedures for handling disputed claims and dis-incentivize anyone from serving as a  
10 personal representative by exposing them to personal liability merely for disallowing a disputed  
11 claim. PH&S-O seems to argue a personal representative's fiduciary duty to a claimant requires  
12 her to allow any claim submitted. Unless such a duty exists, PH&S-O has failed to state a claim  
13 because it has not alleged any other basis for its breach of fiduciary duty claim against Mancuso.

14 Moreover, PH&S-O has not suffered any damages. When a personal representative, such  
15 as Mancuso, disallows a claim in accordance with the probate code, the claimant does not suffer  
16 any damages because the claim will still be allowed if the claimant proves the validity in a  
17 summary determination or separate action. A claimant's obligation to prove the validity of its  
18 claim is expressly contemplated by the probate code and does not constitute any damage.

19 **I. PH&S-O Failed to Allege Facts Sufficient to Show Breach of Fiduciary Duty**

20 PH&S-O contends Mancuso owed it a fiduciary duty and she breached that fiduciary  
21 duty; however, PH&S-O has not alleged any facts sufficient to establish a breach of fiduciary  
22 duty claim. Instead, PH&S-O merely alleges Mancuso disallowed a claim she should have  
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1 allowed. This is not a breach of fiduciary duty, as it merely requires PH&S-O to prove the  
2 validity of its claim. The probate code explains the kinds of actions that give rise to liability  
3 under ORS § 114.395:

4 If the exercise of power by a personal representative in the administration of an estate is  
5 improper, the personal representative is liable for breach of fiduciary duty to interested  
6 persons for resulting damage or loss to the same extent as a trustee of an express trust.  
**Exercise of power in violation of a court order is a breach of duty. Exercise of power  
contrary to the provisions of the will may be a breach of duty.**

7 ORS § 114.395. Acting in violation of a court order gives rise to liability for breach of fiduciary  
8 duty, and acting contrary to the terms of the will might give rise to such liability. *Id.*

9 Courts have found liability under this code section when personal representatives have  
10 acted wrongfully to the detriment of the estate. For example, when a personal representative  
11 made statements as a “joke” that he had not accounted for all the assets and those statements had  
12 to be investigated at the expense of the estate, the personal representative breached his fiduciary  
13 duty. *Moser v. Van Winkle*, 103 Or App 398 (1990). When a personal representative paid  
14 himself out of estate assets without following proper procedures for obtaining authorization for  
15 payment, he breached his fiduciary duties to the estate. *In re Coe*, 302 Or 553 (1987).

16 Courts have contemplated liability for breach of fiduciary duty in situations in which a  
17 personal representative sells estate assets or compromises a wrongful death claim for insufficient  
18 value. See *In re Estate of White*, 289 Or 13 (1980); *Wittick v. Miles*, 274 Or 1 (1976); *In re Estate*  
19 *of White*, 41 Or App 439 (1979). However in these cases, liability was not found. Courts have  
20 found or contemplated possible liability for breach of fiduciary duty only when estate assets have  
21 been improperly depleted.

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1 PH&S-O simply does not allege any facts sufficient to establish a breach of fiduciary  
2 duty. PH&S-O contends it alleges facts supporting its breach of fiduciary duty claim at  
3 paragraphs 6 through 12 of its Complaint. (Pl.'s Opp'n to Mo. to Dismiss, at p. 6.) But these  
4 paragraphs from the Complaint lack any facts sufficient to state such a claim.

5 Paragraph 6 merely alleges PH&S-O submitted a claim, Mancuso requested proof of the  
6 claim, and PH&S-O submitted documentation in support of its claim. (Complaint, at ¶ 6.) None  
7 of these allegations support any finding of a breach of fiduciary duty, as they are all perfectly  
8 consistent with the probate code. *See* ORS §§ 115.005; 115.025; 115.045.

9 Paragraph 7 asserts Mancuso disallowed the claim and refers to the Notice of Disallowance  
10 attached to the Complaint. (Complaint, at ¶ 7.) The Notice of Disallowance of Claim states,  
11 “Through your claim, you seek to collect excessive, unreasonable charges that neither the decedent  
12 nor the estate ever agreed to pay.” (Complaint, at Ex. 2.) Paragraph 7 incorrectly alleges the Notice  
13 of Disallowance of Claim states, ““neither the decedent nor the estate ever agreed to pay’ PH&S-  
14 O’s Charge Master rates . . . .” (Complaint, at ¶ 7.) This allegation conflicts with the Notice of  
15 Disallowance of Claim, which is attached to the Complaint (unless PH&S-O contends its Charge  
16 Master rates are excessive and unreasonable). Paragraph 7 also incorrectly alleges the Notice of  
17 Disallowance of Claim states “Pahalad should have been entitled to be paid by reference to  
18 Medicare rates.” (Complaint, at ¶ 7.) Again, the Notice of Disallowance of Claim attached to the  
19 Complaint demonstrates this allegation is false, as it contains no such statement. Allegations that  
20 are inconsistent with documents attached to the Complaint are not entitled to the presumption of  
21 truth accorded to well-pled factual allegations when deciding a motion to dismiss. Finally, PH&S-  
22 O asserts “the rates to which Pahalad agreed were the rates reflected in the Obligation and in the  
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1 Claim.” (Complaint, at ¶ 7.) This statement is merely a judgment as to the proper interpretation of  
2 an alleged contract; thus, it is a legal conclusion which the court does not accept as true when  
3 deciding a motion to dismiss. *Fearing v. Bucher*, 328 Or 367, 371 (1999). Thus, the only well-pled  
4 factual allegation in paragraph 7 is the fact that Mancuso disallowed the claim.

5 Paragraph 8 realleges prior allegations and contains no new allegations.

6 Paragraph 9 contains a series of legal conclusions, but no ultimate facts. Paragraph 9  
7 merely concludes Exhibit 1 to the Complaint is a “valid, enforceable contract,” Mancuso breached  
8 the contract by disallowing PH&S-O’s claim, and PH&S-O has been damaged in the amount of  
9 \$435,502.17. These legal conclusions are not accepted as true or considered when reviewing the  
10 sufficiency of the complaint. *See Fearing*, 328 Or at 371.

11 Paragraph 10 realleges prior allegations and contains no new allegations.

12 Paragraph 11 merely contains legal conclusions concerning Mancuso’s legal obligations as  
13 a personal representative, but it contains no ultimate facts for the Court to consider on this motion  
14 to dismiss. *See Fearing*, 328 Or at 371.

15 Finally, Paragraph 12 asserts “Mancuso’s arbitrary denial of the Claim constituted a breach  
16 of her fiduciary duty under ORS 114.395, for which Mancuso is personally liable to PH&S-O to  
17 the extent that PH&S-O is or may be damaged by that breach.” Again, paragraph 12 is merely  
18 another set of legal conclusions devoid of any well-pled factual matter.

19 Distilling paragraphs 6 through 12 down to the well-pled factual matter which the Court  
20 may consider when reviewing the sufficiency of the Complaint, PH&S-O has merely alleged that  
21 Mancuso disallowed PH&S-O’s claim. PH&S-O does not allege violation of a court order, actions  
22 inconsistent with a will, self-dealing, wasting of assets, or any other wrongful conduct.

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1 Disallowing a claim PH&S-O contends should have been allowed is simply not the type of conduct  
2 for which a personal representative may be liable for breach of fiduciary duty.

3 If PH&S-O has stated a claim for wrongful denial of probate claim on these facts, then the  
4 Court must necessarily agree that any time a personal representative disallows a disputed probate  
5 claim, the claimant can state a claim for breach of fiduciary duty. Such a holding would have a  
6 chilling effect on disallowances of disputed claims, incentivize personal representatives to allow  
7 any claim submitted to the estate to avoid personal liability even to the detriment of interested  
8 persons with legitimate claims or interests, and dis-incentivize anyone from serving as a personal  
9 representative for fear of having to defend against breach of fiduciary duty claims any time they  
10 disallow a disputed claim.

11 **II. PH&S-O Fails to State a Claim Regardless of Whether ORS § 115.405 Governs**  
12 **Mancuso's Personal Liability in this Action**

13 PH&S-O spends substantial time in its opposition papers arguing ORS § 114.405, which  
14 is titled "Personal Liability of Personal Representative," does not apply to its action to impose  
15 personal liability against Mancuso for her actions as a personal representative. PH&S-O has two  
16 principal arguments. First, it argues PH&S-O is not a third party, but rather an interested party.  
17 Second, it argues the clause "as distinguished from fiduciary accountability to the estate," makes  
18 this § 114.405 inapplicable to personal liability of personal representatives to claimants. The  
19 Court does not need to resolve this issue because even if ORS § 114.405 does not apply to  
20 Mancuso's liability, PH&S-O has still failed to allege any facts sufficient to support a claim for  
21 breach of fiduciary duty under ORS § 114.395 for the reasons set forth in section I.

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1 PH&S-O seeks to impose personal liability on Mancuso for actions she allegedly took as  
2 a personal representative. Accordingly, the code section governing personal liability of personal  
3 representatives controls when personal liability may be imposed. The fact that PH&S-O is an  
4 interested party does not make ORS § 114.405 inapplicable. There is nothing inconsistent with  
5 PH&S-O being both an interested party and a third party. ORS § 114.395 governs fiduciary  
6 obligations owed to interested parties, while ORS § 114.405 governs the personal liability of  
7 personal representatives. The two sections are consistent even if a party, like PH&S-O, is both an  
8 interested party and a third party. One code section governs fiduciary obligations and the other  
9 governs personal liability.

10 The phrase “as distinguished from fiduciary accountability to the estate” in ORS  
11 § 114.405 does not make that section inapplicable to PH&S-O’s action to impose personal  
12 liability on Mancuso. A personal representative has fiduciary accountability to the estate, but  
13 PH&S-O is not the estate. Thus, the fact that a personal representative’s personal liability to a  
14 third party is different from its fiduciary obligation to the estate does not make § 114.405  
15 inapplicable to PH&S-O’s effort to impose personal liability.

16 Nevertheless, the Court does not have to apply ORS § 114.405 in order to dismiss PH&S-  
17 O’s cause of action. The Court should dismiss the cause of action because PH&S-O fails to  
18 allege any conduct supporting a claim for breach of fiduciary duty. Accordingly, the Court need  
19 not resolve the issue regarding the applicability of ORS § 114.405.

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1 **III. PH&S-O Has Not Suffered or Alleged Damages**

2 In order to state a claim for breach of fiduciary duty, the plaintiff must allege damages.  
3 See ORS § 114.395. PH&S-O did not allege any damages flowing from the alleged breach of  
4 fiduciary duty in the Complaint. Instead, PH&S-O stated “Mancuso is personally liable to  
5 PH&S-O to the extent that PH&S-O is or may be damaged . . . .” (Complaint, at ¶ 12.) This  
6 statement is not sufficient to show it suffered any damages. The fact that it may suffer damages  
7 in the future is not sufficient to state a claim for relief. *Lowe v. Philip Morris USA, Inc.*, 207 Or  
8 App 532, 548–50 (2006).

9 Although damages are not pled in the Complaint, PH&S-O argues in its opposition papers  
10 that it is entitled to recover costs, attorney’s fees, and interest that will be incurred in the action it  
11 filed to prove its claim. (Pl.’s Opp’n to Mot. to Dismiss, at p. 6.) Even if PH&S-O were permitted  
12 to amend its pleadings through its opposition papers, which it is not, the costs, attorney’s fees, and  
13 interest are not recoverable as damages.

14 **A. Attorney’s Fees**

15 Under the American Rule, a litigant generally cannot recover attorney’s fees unless there is  
16 a statutory or contractual right to recover such fees. *Peace River Seed Co-op, Ltd. v. Proseeds*  
17 *Marketing, Inc.*, 355 Or 44, 65 (2014). Attorney’s fees are generally not recoverable as  
18 consequential damages. *Raymond v. Feldman*, 124 Or App 543, 548–49 (1993). See also *Strawn v.*  
19 *Farmers Ins. Co.*, 353 Or 210, 227–228 (2013). Absent a contractual or statutory entitlement to  
20 attorney’s fees, they are recoverable as damages only when the defendant’s conduct caused the  
21 plaintiff to become engaged in litigation with a third party. See *Huffstutter v. Lind*, 250 Or 295, 301  
22 (1968).

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1 PH&S-O did not allege any facts that would entitle it to attorney's fees for Mancuso's  
2 alleged breach of fiduciary duty because it has not identified any contractual or statutory obligation  
3 on the part of Mancuso to pay PH&S-O's attorney's fees. PH&S-O also has not alleged Mancuso's  
4 conduct caused it to become embroiled in litigation with any third party. Instead, PH&S-O cites  
5 *Moser v. Van Winkle*, 103 Or App 398, 403 (1990), for the proposition that costs and attorney's  
6 fees incurred to prove the validity of its claim are recoverable as damages. But *Moser* does not  
7 support such a broad right to recover attorney's fees and is easily distinguishable from the case at  
8 bar. In *Moser*, the court of appeals affirmed a surcharge against Moser for false statements he made  
9 about missing assets that caused respondents to investigate at the expense of the estate. *Id.* at 400,  
10 403. The attorney's fees awarded against Moser were expenses of the estate because they were  
11 incurred to investigate missing assets as a result of Moser's statements. *Id.* at n.3. The court of  
12 appeals found it significant that Moser's false statements "resulted in an investigation that depleted  
13 estate assets . . . ." *Id.* at 402. *Moser* stands for the narrow proposition that a personal  
14 representative can be liable for the costs of a breach of fiduciary duty when that breach depletes  
15 estate assets, which is entirely consistent with the language in § 114.395 requiring the breach  
16 results in "damage or loss." *See* O.R.S. § 114.395.

17 Here, unlike in *Moser*, Mancuso has done nothing other than disallow PH&S-O's claim as  
18 provided in the statutes and her actions have not resulted in the depletion of any estate assets. The  
19 key factor in *Moser*—depletion of estate assets—is completely lacking in this case. PH&S-O is not  
20 seeking to recover attorney's fees paid by the estate, it is merely seeking attorney's fees it may  
21 incur in seeking to prosecute this action to recover additional payments from the estate. Attorney's  
22 fees incurred to prosecute a claim are not recoverable unless there is some statutory or contractual  
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1 obligation to pay attorney's fees. *See Peace River*, 355 Or at 65. PH&S-O is not entitled to recover  
2 attorney's fees for Mancuso's alleged breach of fiduciary duty; thus, they cannot be the damages  
3 suffered by PH&S-O.

4 **B. Interest**

5 PH&S-O also contends its damages from the alleged breach of fiduciary duty include  
6 interest on its probate claim. The right to interest on probate claim does not arise until after a claim  
7 becomes "due" under the probate code. *Thomas by & Through Peterson v. State (In re Estate of*  
8 *Thomas)*, 319 Or 520, 528 (1994). Payment of a claim is not "due" until the time provided in ORS  
9 § 115.115. In turn, § 115.115 provides that claims against the estate become due only after they  
10 have been allowed. ORS § 115.115. PH&S-O's probate claim has not been allowed—it was  
11 disallowed; thus, payment is not "due" and interest has not accrued. *See In re Estate of Thomas*,  
12 319 Or at 528–29. Since PH&S-O is not entitled to interest yet, that cannot be the damage suffered  
13 by PH&S-O. Accordingly, PH&S-O not only failed to plead any damages arising from the alleged  
14 breach of fiduciary duty, but also failed to identify any damages suffered from the alleged breach  
15 in its opposition papers. The Court should grant Mancuso's motion because PH&S-O has not  
16 suffered any damages for the alleged breach of fiduciary duty.

17 **CONCLUSION**

18 The Court should dismiss PH&S-O's cause of action for wrongful denial of probate claim  
19 because the Complaint fails to allege any facts sufficient to state a claim for breach of fiduciary  
20 duty or establish any damages caused by the alleged breach of fiduciary duty. PH&S-O has alleged  
21 nothing other than Mancuso disallowed its claim, causing it to have to prove the validity of the  
22 disputed claim. Such allegations are insufficient to show a breach of fiduciary duty and fail to  
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1 identify any damages. If PH&S-O can prove the validity of its probate claim, the claim will be  
2 allowed and paid pursuant to the requirements of the probate code. PH&S-O's wrongful denial of  
3 probate claim cause of action was filed solely because PH&S-O does not want the burden of  
4 having to prove the validity of its doubtful claim against the estate. The Court should grant  
5 Mancuso' motion to dismiss.

6 DATED: January 16, 2017

7 Thatcher Smith Law, LLC

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